



## INTERIOR BOARD OF INDIAN APPEALS

Sharon Gitchel, Conservator for Erin Rita German, et al., Minors  
v. Minneapolis Area Director, Bureau of Indian Affairs

28 IBIA 46 (06/06/1995)

Related Board case:  
32 IBIA 77



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

SHARON GITCHEL, Conservator for	:	Order Affirming Decision
ERIN RITA GERMAN et al., Minors,	:	
Appellant	:	
	:	
v.	:	Docket No. IBIA 94-161-A
	:	
MINNEAPOLIS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	June 6, 1995

This is an appeal from a June 17, 1994, decision of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Indian Land Certificates 64 and 65, issued in 1944 to John Cermak, who was described in the certificate as "a member of the Mdewakanton band of Sioux Indians residing in Minnesota." Appellant contended before the Area Director that the certificates conveyed inheritable interests to Cermak. The Area Director rejected that contention. Appellant Sharon Gitchel is conservator for Erin Rita German, Noah Edward German, and Andrea Mary German, minor children of Edward Cermak, the deceased son of John Cermak, who is also deceased.

The history of the Mdewakanton Sioux land certificates was discussed in some detail in Brewer v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 110, 89 I.D. 488 (1982). Very briefly, these certificates were issued, apparently beginning about 1904, to certain Mdewakanton Sioux Indians residing in Minnesota. They covered lands in Scott, Redwood, and Goodhue Counties, Minnesota, which were purchased for the benefit of this group of Indians by the Secretary of the Interior with funds appropriated by the Acts of June 29, 1888, 25 Stat. 217, 228-29; March 2, 1889, 25 Stat 980, 992; and August 19, 1890, 26 Stat. 336, 349. In a September 30, 1915, letter quoted in Brewer, the Assistant Commissioner of Indian Affairs described the Department's intent with regard to the certificates, *i.e.*, to convey only "conditional occupancy and use" to the certificate holders and "not to dispose of any permanent interest in these lands pending further legislation." 10 IBIA at 117, 89 I.D. at 491. The letter also described the plan of the Indian Office to propose legislation which would authorize allotment of the lands under the General Allotment Act of 1887.

No such legislation was ever enacted. Instead, in 1980, Congress enacted legislation providing:

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States--

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Indian Community of Minnesota;

\* \* \* \* \*

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

(Act of Dec. 19, 1980, 94 Stat. 3262).

As summarized in Brewer, "[t]he Department's position concerning these lands has \* \* \* consistently been that they were not made available by Congress for allotment, were never allotted, and were therefore available in 1980 to become tribal lands held by the Department in trust. Congress approved this position when it adopted the 1980 Act." 10 IBIA at 118-19, 89 I.D. at 492.

Indian Land Certificates 64 and 65 were issued to John Cermak on May 11, 1944. Each covered 25 acres in Scott County, Minnesota. Cermak died on April 10, 1989. By letter of June 19, 1989, counsel for Cermak's executor requested that BIA initiate probate proceedings for Cermak. <sup>1/</sup> Counsel contended that Cermak's interest in the property covered by the certificates was an allotment. In the alternative, he contended that, even if the interest was only an assignment, it was inheritable and therefore should be probated by the Department in the same manner as an allotment.

The Area Director responded on October 27, 1989, stating that the land assignments held by Cermak were not within the Department's probate jurisdiction because the assigned lands were not individually owned trust or restricted lands but instead were held in trust for the Shakopee Mdewakanton Sioux Community (Community) pursuant to the 1980 statute.

On January 22, 1990, the Community requested that Indian Land Certificates 64 and 65 be cancelled, and on July 2, 1990, the Area Director cancelled them. On August 9, 1990, counsel for Cermak's executor wrote to the Community, indicating that he might file suit in Federal court to determine the inheritability of Cermak's interest. His letter also set out the terms of a proposed settlement of his client's claim. The record does not show that the Community responded to this letter or that the executor took any further action.

Edward Cermak died on May 21, 1992. Two years later, on May 3, 1994, counsel for appellant wrote to the Area Director, demanding that BIA "immediately perfect the possessory interest of John Cermak in these lineal

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<sup>1/</sup> Cermak's will devised to his son Edward "the interest that I may have in the real property granted to me by Indian Land Certificates number 64 and number 65." See Oct. 17, 1989, Letter from the Field Solicitor, Twin Cities, to the Area Director.

descendants and immediately place the named children in possession and occupancy pursuant to Law." The Area Director responded on June 17, 1994, again stating that the lands at issue were the property of the Community pursuant to the 1980 statute. The Area Director's decision informed appellant that she could appeal the decision to the Board.

Appellant filed a notice of appeal with the Board, contending "that Certificates 64 and 65 were excluded from operation of the Act of December 19, 1980 \* \* \* and that appellants were entitled to a reassignment priority in accordance with Bureau Administrative Practice established in 1915" (Notice of Appeal at 1). Appellant subsequently filed a brief, and the Community filed an answer brief.

At first glance, it would appear that this matter should have been finally concluded for the Department in 1989, when John Cermak's executor did not appeal the Area Director's October 27, 1989, letter. However, the Area Director's October 27, 1989, letter failed to provide appeal information. Under appeal regulations which became effective on March 13, 1989, an interested party's time to appeal a BIA decision does not begin to run until he/she has been properly informed of appeal procedures. 25 CFR 2.7. 2/ Therefore, the Area Director's October 27, 1989, has remained appealable until this time. In effect, appellant now appeals that decision as well as the Area Director's June 17, 1994, decision.

While, as a procedural matter, both the 1989 and 1994 decisions are appealable, the substantive issue in this appeal was resolved finally for the Department in Brewer. The Board clearly held in that case that land assigned by a land certificate like the ones at issue here "were never personally allotted to" the certificate holder, who was therefore "not \* \* \* the beneficial owner of an interest in allotted Indian trust lands." 10 IBIA at 119, 89 I.D. at 492. Further, as discussed in Brewer, there is simply no question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the Community.

Appellant appears to argue that John Cermak held an inheritable interest which was protected from the effect of the 1980 Act, presumably by section 3 of the Act. For the reasons discussed in Brewer and summarized above, the Board finds that Cermak had no inheritable interest that could have been protected by section 3, even though that provision protected his assignment during his lifetime.

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2/ 25 CFR 2.7 provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions \* \* \* shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

Appellant also contends that "appellants [i.e., the minors represented by appellant] were entitled to a reassignment priority in accordance with Bureau Administrative Practice established in 1915." In support of this contention, appellant submits a portion of a 1971 Field Solicitor's letter describing BIA practice at the time the letter was written. 3/ It is clear that BIA's pre-1980 administrative practice concerning reassignments is no longer applicable here. Rather, it is Community law and practice which now controls the use of this property.

If the minors have any rights to an assignment of the land formerly subject to Land Certificates 64 and 65, it would be solely as a matter of Community law. The appropriate course of action for appellant to follow, therefore, is to seek information from the Community concerning any rights the minors may have in this regard and to pursue any such rights through Community procedures. 4/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's June 17, 1994, decision is affirmed.

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//original signed  
Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

3/ The July 12, 1971, letter, of which appellant submits only the first page, states in part:  
"[The Minnesota Agency, BIA,] will not issue a Land Certificate on a tract of land unless the Council of the Shakopee Mdewakanton Community has recommended that the land be assigned to a particular individual and unless the person can be shown to be a descendant of a Mdewakanton Sioux residing in Minnesota on May 20, 1886. Upon the death of a person holding a Certificate, the land is available for use by a child or children of the person, and the Council will recommend to the Agency which of the children should be assigned the land. The Agency then cancels the original Certificate and issues a new one in the name of the child to use the land."

4/ The Community has submitted copies of its ordinances concerning use of Community lands. The Board does not undertake to interpret these ordinances. Rather, it refers appellant directly to the Community, which has primary authority to interpret its own laws. See Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163 (1995).